

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

CHRISTINE H. HAVENS,

CASE NO. 89-00015

Debtor

Chapter 13

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APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

This contested matter is before the Court by way of a motion filed by Christine H. Havens ("Debtor") to avoid judicial liens of Beneficial Finance of New York, Inc. ("Beneficial") and Abelow, Siegel, Hester & Stephens, Esqs. ("Abelow"), pursuant to §522(f) of the Bankruptcy Code (11 U.S.C.A. §§101-1330) ("Code"). Only Abelow has filed a Response in opposition to the Debtor's motion.

Argument on the Debtor's motion was heard on October 24, 1989 at Utica, New York and the matter was finally submitted on November 14, 1989.

### FACTS

The Debtor filed a petition for relief under Chapter 13 of the Code on January 4, 1989. The facts herein are undisputed.

At the time of filing, the Debtor owned, resided at and claimed an exemption in real property located at Walnut Road, Woodgate, New York ("Property"). The Debtor listed the value of the Property in her petition at \$50,000.00, subject to a first mortgage securing an outstanding balance of \$37,000.00. The Debtor has claimed \$10,000.00 as her exemption in the Property "pursuant to Article 10-A of the New York Debtor and Creditor Law" which the Court will treat as the homestead exemption. See Debtor's Petition, Schedule B-4.

The judicial lien of Abelove in the amount of \$829.63 was docketed on November 23, 1988 and, therefore, is second in priority to that of Beneficial which was docketed on September 13, 1988 in the amount of \$2,290.66.

### JURISDICTION

The Court has subject matter jurisdiction over the instant motion pursuant to 28 U.S.C.A. §§157, 1334 (West Supp. 1989). The following is a core proceeding under 28 U.S.C.A. §157(b)(1), (b)(2)(K) and (O).

### ARGUMENTS

The Debtor claims that her equity in the Property is fully exempt and thus, the judicial liens of Beneficial and Abelow must be avoided because they impair her exemption within the meaning of §522 of the Code. See Attorney's Affirmation in Support of Motion To Avoid The Fixing of Judicial Lien at 2.

The Debtor also maintained, at oral argument of the motion on October 24, 1989, that real estate broker's commissions and Chapter 13 Trustee's statutory commissions must additionally be deducted from the fair market value of the Property in determining equity for the purpose of lien avoidance under Code §522(f).

Abelow opposes Debtor's motion based on the fact that, according to Debtor's representation of the Property's value in her petition, the Debtor has equity in the Property in the amount of \$3,000.00 "over and above the exemption." See Abelow's Affidavit in Opposition to Motion at 1.

At oral argument, Abelow also disputed Debtor's contention that commissions due to real estate brokers and the Trustee may be deducted from fair market value in determining Debtor's equity in the Property.

### DISCUSSION

Section 522(f) of the Code allows a debtor to avoid a judicial lien on exemptable property to the extent that the lien "impairs

an exemption to which the debtor would have been entitled." 11 U.S.C. §522(f).

Pursuant to Code §522(b)(1), New York has "opted out" of the federal exemption scheme found in Code §522(d). New York's homestead exemption is provided for at §282 of New York Debtor and Creditor Law and set forth at §5206 of the New York Civil Practice Law and Rules ("NYCPLR"). NYCPLR §5206 provides for a homestead exemption in an amount "not exceeding ten thousand dollars in value above liens and encumbrances." (McKinney 1978 Supp. 1990).

In order to determine whether the homestead exemption is impaired, the debtor's equity in the property must first be established. This Court has previously held that equity for the purpose of judicial lien avoidance under Code §522(f)(1) is equal to the fair market value of the property minus the sum of any outstanding mortgages and any unavoidable liens. See In re Bovay, Case No. 89-00625, slip op. at 4 (N.D.N.Y. December 18, 1989).

In the case at bar, the only evidence of the fair market value of the Property is the value of \$50,000.00 listed in the Debtor's petition. The result of subtracting the outstanding mortgage balance (\$37,000.00), also excerpted from the Debtor's petition, from the fair market value of the Property (\$50,000.00), yields the amount of \$13,000.00 representing equity.

The Debtor has also argued that Trustee's and real estate broker's commissions must be subtracted from the above amount of \$13,000.00 in order to determine Debtor's equity. However, this Court has recently held in a similar matter concerning a debtor's

equity in exemptable real property within the context of a motion brought under Code §522(f), that "expenses relating solely to the sale of an asset will not be subtracted from the fair market value of the property in determining equity for the purpose of Code §522(f)." In re Yackel, Case No. 89-00934, slip op. at 6 (N.D.N.Y. January 3, 1990). Accordingly, the Court concludes in the instant case that the Debtor's equity in the Property at the time of filing her petition was \$13,000.00.

Having determined the Debtor's equity in the Property to be \$13,000.00, it appears that an amount of \$3,000.00 remains after applying Debtor's \$10,000.00 homestead exemption pursuant to NYCPLR §5206. The total of Beneficial's first priority judicial lien (\$2,290.66) and Abelow's judicial lien (\$829.63) is \$3,120.29. The aggregate amount of the judicial liens exceeds the amount available after Debtor's exemption (\$3,000.00) by \$120.29.

Typically, as Abelow's lien is subordinate to Beneficial's, it would impair the Debtor's homestead exemption by \$120.29.

In the case at bar, however, Beneficial has chosen not to respond or oppose the Debtor's motion to avoid its judicial lien.

Proper notice to Beneficial is evidenced by an Affidavit of Service By Mail sworn to on August 3, 1989 appended to Debtor's motion which indicates that the instant motion was served upon counsel for Beneficial by mail on August 3, 1989. The Court views Beneficial's decision to forego opposition of the Debtor's motion after receiving proper notice as implied consent to avoidance of its lien. Beneficial's first priority judicial lien in the amount of \$2,290.66 is therefore avoided.

The consensual avoidance of Beneficial's lien results in the analysis of Abelow's judicial lien as if it were the only judicial lien for the purpose of Code §522(f). Examined thusly, Abelow's lien does not exceed the amount of the Debtor's equity in the Property above her homestead exemption and, therefore, does not impair that exemption within the meaning of Code §522(f). The Court finds, therefore, that Abelow's judicial lien cannot be avoided pursuant to Code §522(f)(1). Based upon the foregoing, it is hereby,

ORDERED, that the Debtor's motion is denied as to the Abelow judicial lien, and it is further

ORDERED, that Beneficial shall be deemed to have impliedly consented to the avoidance of its judicial lien which is hereby avoided in its entirety.

Dated at Utica, New York

this        day of February, 1990

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STEPHEN D. GERLING  
U.S. Bankruptcy Judge